SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 780

NORWICH UNION FIRE INSURANCE SOCIETY, LTD., PETITIONER AND APPELLANT BELOW,

vs.

J. M. SCOTT, RESPONDENT AND APPELLEE BELOW.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below.

The opinions in the United States Circuit Court of Appeals, Sixth Circuit, which have not yet been reported, appear: Majority Opinion (R. 224-230); Dissenting Opinion (R. 230-245).

II.

Jurisdiction.

1. The date of the judgment to be reviewed is January 6, 1931 (R. 248).

The petition for rehearing filed by this petitioner January 9, 1931 (R. 249), was denied February 10, 1931 (R. 261), Judge Killetts dissenting.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is *Judicial Code, Section* 240, as amended by the act of February 13, 1925, Chapter 229 (43 Statutes at Large, pp. 938, 939) (28 U. S. C. A. No. 347).

3. This is a civil action in the United States Circuit Court of Appeals for the Sixth Circuit in which a judgment has been rendered against this petitioner (R. 248) and in which a petition for rehearing has been filed (R. 249) and denied (R. 261).

The jurisdiction of this Court is invoked upon the several grounds specifically assigned in the petition submitted herewith and hereafter summarized in this brief under the heading "Specification of Errors."

4. The cases believed to sustain such jurisdiction are as follows:

Forsyth vs. Hammond, 116 United States Reports 506, 514, 515.

Delk vs. St. Louis & San Francisco R. R. Co., 220 United States Reports, 580-586.

Lau Ow Bew vs. United States, 144 United States Reports, 47, 58.

III.

Statement of the Case.

This case has already been stated in the preceding petition for writ of certiorari under subdivision I, headed "Summary Statement of the Matter Involved" pp. 1-8.

Supplementary thereto and with particular reference to the increase of hazard involved in the prohibited incumbrance by chattel mortgage in the instant case, we quote the following additional facts in the language of the dissenting Circuit Court of Appeals opinion of Judge Killetts (R. 239-240), with appropriate record pages added thereto:

> "First in order of time was the insured's situation, June 14, 1926, when the Sun and Norwich Union policies issued (Exhibits 4 and 5, R. 125, 133). Then, according to insured's (Scott's) testimony, he had stored, afterwards destroyed, at least 70,000 pounds of wool, mostly bought in 1925, and held for a year on a falling market (R. 78). His proof of loss admits that this property cost him in 1925 $34,800.00, a shrinkage in value of 17½ per cent. The amount of wool as 70,000 pounds depends upon his naked word. An attempt at corroboration by going to his vendors disclosed 40,006 pounds purchased in 1925, and 7,187 pounds in 1926 (R. 78), or 47,247 pounds in all. On this he had, until June 14, $5,000 insurance in the Westchester company. He was indebted, according to his testimony, to the Cumberland Savings Bank in the principal sum of $18,200 (R. 76),

'represented (language of chattel mortgage) (Exhibit 24, p. 204) by various promissory notes of various dates and amounts', signed by himself, by his wife, or by both. Having taken out the Sun and Norwich Union policies for an aggregate of $11,500 on June 14, five days later he gave the Bank the chattel mortgage, and five days still later or ten days after their issue, the Sun and Norwich Union policies were caused to carry the rider loss payable clause. Then, July 6, he took out the Home policy for $8000 on which, at once, was attached the rider. Bracken, the agent writing these three policies for $19,000, was at the same time cashier of the chattel mortgagee bank (R. 81). August 14 the last policy for $3,500 was taken out. During the season of 1926, Scott's principal purchases were on commission for a Mr. McMurdy (R. 78). August 28 all of the McMurdy wool was taken out. Saturday afternoon, September 2, some wool was again bought and stored in the burned building for McMurdy. In the early morning of Monday, September 6, the fire occurred. All of Scott's records were destroyed. Cumberland, where the fire occurred, and where the chattel mortgage was executed, and where Bracken lived, was a small village of less than 1,000 population as shown by the census. Bracken had been at the storage place during the period involved 'several times to see Mr. Scott (the insured) on business.' The chattel mortgage executed June 19, was neither filed nor verified, wherefore it was at all times insufficient to protect Bracken's bank from intervening creditors of Scott.

"I draw no inferences from these facts save, 1. That Scott was in losing and involved circum-

stances during the entire time; 2. That his condition was more or less obvious in this small community, especially known to Bracken, the active agent of his very large creditor, the bank; 3. That the latter, through Bracken, had an acute interest in protecting its numerous and, in the aggregate, large loans; 4. That Bracken, being at the same time in the business of loaning money and protecting the loans, and an insurance agent issuing the critical policies, presumably knew both how to protect his bank against the insurance companies in the use of an effective loss payable clause and, against Scott's creditors, what was necessary to be done with the mortgage; 5. That the moral hazard, always recognized in the arising of a mortgage lien, was intensified in this instance because of Scott's failing fortunes; 6. That significance attaches to the facts that the mortgage was not filed and that riders of the character shown in the records were used."

IV

Specification of Errors.

1. The Circuit Court of Appeals for the Sixth Circuit in its majority opinion erred in finding and holding, though the loss-payable clause by its express terms was subject to all the terms and conditions of the policy, and though the loss-payable clause contained no reference to chattel mortgage and no description of the payee as a chattel mortgagee or as having any interest whatever in the property, and though the loss-payable clause did not contain the words "as interest may appear", that nevertheless

the loss-payable clause in this case constituted a written waiver of the condition in the policy prohibiting incumbrance by chattel mortgage in the entire absence of pleading or proof of a course of dealing between the parties, or of usage, or custom, qualifying the unambiguous language used.

2. The Circuit Court of Appeals for the Sixth Circuit in its majority opinion erred in altering the clear and unambiguous language of the written insurance contract by a construction thereof based upon a supposed custom or usage assumed by the court, and for which there is no foundation either in the pleadings or the evidence or in point of fact.

3. The Circuit Court of Appeals for the Sixth Circuit in construing and declaring the effect of the clear and unambiguous language of the loss-payable clause and the policy in suit erred in this action at law, in which there was no pleading or proof of fraud or mutual mistake, in considering and giving effect to the claimed knowledge of this petitioner's local soliciting agent of the incumbrance by chattel mortgage, which knowledge was acquired in his capacity as cashier of the adversely interested payee bank, and was not communicated to the insurance company.

4. The Circuit Court of Appeals for the Sixth Circuit erred in finding and holding that an insurance company has waived performance by the insured of the appraisal condition precedent of the policy when the insurance company has simply disagreed with the insured's claim as to the amount of the loss without deny-

ing liability prior to suit, and when subsequent to suit the insurance company has merely filed an answer alleging the defense of failure by the insured to perform this condition precedent as to appraisal of the amount of the loss, and alleging a further defense of incumbrance by chattel mortgage in violation of the terms of the policy.

V.

Summary of the Argument.

1. THE LOSS-PAYMENT CLAUSE RIDER WAS NOT A WAIVER OF THE PROHIBITED INCUMBRANCE BY CHATTEL MORTGAGE.

Point A. The provision in the policy prohibiting chattel mortgage without consent endorsed in writing thereon, intended as it is to reduce the moral hazard, is valid, and violation thereof by incumbrance of any of the property insured constitutes an entire defense.

Hunt vs. Springfield Fire & Marine Ins. Co., 196 U. S. 47.

Mulrooney vs. Royal Insurance Co., 163 Fed. 833 (C. C. A. Iowa, 1908), First Syllabus, p. 835.

Hartford Fire Ins. Co. vs. Downey, 223 Fed. 707 (C. C. A. W. Va. 1915), Syllabus, pp. 712, 715.

Ohio Farmers Ins. Co. vs. Titus, 82 O. S. 161.

Hartford Fire Ins. Co. vs. Jones, 15 Fed. (2nd) 1 (6 C. C. A. 1926).

Germania Fire Ins. Co. vs. Schild, 69 O. S. 136.

National Fire Ins. Co. vs. Kneidel, 11 O. C. C. (N. S.) 193 (Hamilton County).

Hammel vs. Insurance Co., 24 O. C. C. 101 (Pickaway County).

Webster vs. Dwelling House Ins. Co., 53 O. S. 558.

Point B. The loss-payable clause of the form here employed, by its language, is not informative to the insurer of the existence of the prohibited chattel mortgage, but simply performs the office, well known in insurance practice, of protecting a creditor of the insured who has no interest in the insured property by mortgage or otherwise against the eventuality of fire loss.

Atlas Reduction Company vs. New Zealand Ins. Co. (C. C. A., Judge Van Devanter), 138 Fed. 497-508.

Bates vs. Equitable Insurance Co., 10 Wallace, 77 U. S. 33.

Point C. Even though the loss-clause rider had contained the added words "as interest may appear", which are pointedly absent from the loss clause involved in the instant case, such loss-clause rider would not have constituted a waiver of the prohibited incumbrance by chattel mortgage.

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

Bank vs. Hartford Fire Insurance Co. (District Court, Southern District, Fla. 1924), 1 Fed. (2nd) 43.

Delaware Ins. Co. vs. Greer (C. C. A., Kansas, 1903), 120 Fed. 916.

Erie Brewing Co. vs. Ohio Farmers Ins. Co., 81 O. S. 1, 19-20.

Point D. The absence in the loss-clause rider here in question of the phrase "as interest may appear" upon which alone the dissenting opinion in *Atlas Reduction Co. vs. New Zealand Ins. Co.*, 138 Fed. 487, and the other decisions cited by the majority, were based, leaves the decision of the majority of the Circuit Court of Appeals in the case at bar wholly without precedent and in direct conflict with the controlling decision of this court in

Bates vs. Equitable Insurance Co., 10 Wallace, 77 U. S. 33.

1. IF, AS THE MAJORITY ASSERT, THE ABSENCE OF THE PHRASE "AS INTEREST MAY APPEAR" IS WITHOUT SIGNIFICANCE, THEN THE MAJORITY OPINION IN THE INSTANT CASE IS IN SQUARE CONFLICT WITH THE FOLLOWING CORRECTLY DECIDED CASES:

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

Bank vs. Hartford Fire Ins. Co. (Dist. Court, S. D. Fla., 1924), 1 Fed. (2nd) 43.

Delaware Ins. Co. vs. Greer (C. C. A. Kansas, 1903), 120 Fed. 916.

Point E. Since the loss-payable-clause rider here does not contain the phrase "as interest may appear," the rider and policy are both entirely clear and free from ambiguity, and the majority opinion in this case has therefore violated the rule that it is not permissible for a court by construction to declare and "make a plain agreement ambiguous and then to interpret it in favor of the insured," and that if insurance contracts

(as here) "are clear and unambiguous their terms are to be taken and understood in their plain, ordinary and popular sense."

Insurance Co. vs. McNulty, 157 Fed. C. C. A. 224, 226.

Imperial Fire Ins. Co. vs. Coos County, 151 U. S. 452, 463.

U. S. Fidelity & Guaranty Co. vs. Guenther (Decided Feb. 24, 1930), 281 U. S. 34.

Point F. The majority opinion in this case has erred in basing its construction as to the meaning and effect of the loss-clause rider, in conflict with its clear wording, upon a supposed custom or usage assumed by the majority and for which there is no foundation in the pleadings or the evidence or in point of fact.

Bates vs. Equitable Insurance Co., 77 U. S. (10 Wall.) 33.

Point G. The loss-clause rider in the instant case was not a waiver of the prohibited incumbrance by chattel mortgage because the loss-clause rider was not informative to the insurer of the existence of the inhibited lien, and the knowledge of the insurer's agent of such lien may not be imputed to his principal under this form of policy—no actual knowledge by the insurer being otherwise shown.

Bates vs. Equitable Ins. Co., 10 Wallace, 77 U. S. 33.

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

Northern Assurance Co. vs. Grand View Building Asso., 183 United States Reports, 308.

Lumber Underwriters vs. Rife, 237 United States Reports, 605.

Penman vs. St. Paul Fire & Marine Ins. Co., 216 United States Reports, 311 (1910).

Mutual Life Ins. Co. vs. Hilton Green, 241 United States Reports, 613.

Ætna Life Ins. Co. vs. Moore, 231 United States Reports, 543.

Prudential Insurance Co. vs. Moore, 231 United States Reports, 560.

Point H. Knowledge of the insurer's agent, Bracken, of the inhibited lien and his act in preparing this form of loss-clause rider may not be imputed to his insurance company principal for the additional reason that he was then acting in a dual, incompatible capacity for his bank principal, on the one hand, and for his insurance company principal, on the other.

Point I. The importance to the insuring public and to the insurance companies of an authoritative judicial declaration as to whether it is possible by the form of loss-clause rider here employed to secure a creditor of the insured who has no interest by way of mortgage or otherwise in the insured's property against the casualty of fire without thereby thrusting the materially increased hazard of chattel mortgage incumbrance upon the insurer, calls for a review and final determination of this case by this Court, particularly in view of the direct and irreconcilable conflict between the

Circuit Courts of Appeals, including the Judges of the Circuit Court of Appeals in the instant case.

2. NON-COMPLIANCE BY THE INSURED WITH THE CONDITION PRECEDENT REQUIRING APPRAISAL OF THE AMOUNT OF THE LOSS WAS A BAR TO THE INSURED'S RECOVERY.

Point J. The insurer, by disagreeing with the insured under non-waiver agreement as to the amount of loss without denial of liability, and by filing an answer after suit averring the defense of failure by the insured to perform the condition precedent as to appraisal, and the further consistent defense of violation of the policy inhibition against incumbrance by chattel mortgage, did not waive its right to legal performance by the insured of the condition requiring an award of appraisers fixing the amount of the loss as a condition precedent to the insured's right of action on the policy.

Insurance Co. vs. Carnahan, 63 Ohio State 258.

Graham vs. Insurance Co., 75 Ohio State 374.

Edward Everett Co. vs. Great American Ins. Co., 9 Ohio *Nisi Prius* Reports (New Series) 241, (Affirmed 18 Ohio State 573).

Fire Association vs. Agresta, 115 Ohio State 426, 430.

Orenstein vs. Star Insurance Co. of America, 10 Federal (2nd) 754.

ARGUMENT.

I. The Loss-payable Clause Rider.

POINT A.

The policy provision prohibiting chattel mortgage without consent thereto endorsed in writing upon the policy is valid, and violation thereof constitutes an entire defense.

The insurance contract in suit expressly provides:

> "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, if the subject of insurance be personal property and be or become incumbered by chattel mortgage."

The validity of this clause prohibiting incumbrance by chattel mortgage, and the proposition that violation thereof is an entire defense to any recovery on the policy, is settled by an unbroken line of decisions both by the Federal courts and the courts of Ohio,

Mulrooney vs. Royal Ins. Co. (C. C. A. Iowa, 1908), 163 Fed. 833.

(Page 835:)

> "That a mortgage of personal property increases the insurance hazard is not disputed. Provisions in insurance policies that a mortgage placed upon the property insured shall render the policy void, unless consent of the company thereto shall be indorsed in writing upon the policy, are valid provisions. Atlas Reduction Co.

v. New Zealand Ins. Co., 138 Fed. 497, 71 C. C. A. 21, 9 L. R. A. (N. S.) 433, Connecticut Fire Ins. Co. *v.* Buchanan, 141 Fed. 777, 73 C. C. A. 111, 4 L. R. A. (N. S.) 758; Assurance Co. *v.* Bldg. Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, and cases therein cited."

As this court held in

Carpenter vs. Providence Washington Ins. Co., 41 U. S. (16 Peters) 495, 510,

"the underwriters did not rely so much upon the principles as upon the interest of the insured."

To the same effect are:

Hunt vs. Springfield Fire & Marine Ins. Co., 196 U. S. 47.

Hartford Fire Ins. Co. vs. Downey (C. C. A., W. Va., 1915), 223 Fed. 707, 712, 715.

Webster vs. Dwelling House Ins. Co., 53 O. S. 558.

Ohio Farmers Ins. Co. vs. Titus, 82 O. S. 161.

National Fire Ins. Co. vs. Kneidel, 11 Ohio Circuit Court (N. S.) 193, Hamilton County.

Hammel vs. Ins. Co., 24 Ohio Circuit Court, 101, Pickaway County.

Hartford Fire Ins. Co. vs. Jones, 15 Fed. (2nd) 1 (6 C. C. A. 1926).

Germania Fire Ins. Co. vs. Schield, 69 O. S. 136.

POINT B.

The loss-payable clause of the form here employed, by its language, is not informative to the insurer of the existence of the prohibited chattel mortgage, but simply performs the office well known in insurance practice of protecting a creditor of the insured who has no interest in the insured property by mortgage or otherwise against the eventuality of fire loss.

It is the unquestionable legal right of an insured to select and nominate for coparticipation in the proceeds of his contract a person who has no interest of any kind in the insured property. When that is done, the insurer is called upon only to consider in case of loss whether it will honor such appointment. As held in

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497:

> "Such an indorsement is a common mode of furnishing a species of security by a debtor to his creditor, who may be willing to trust to the debtor's honesty, skill, and success in trade, but who requires some indemnity against such accidents as loss by fire."
>
> "It is not necessary that there should be a chattel mortgage to enable the insured to make a valid appointment of D. & S. to receive payment of the loss, if any, or to give them an interest in the payment of the loss."

See also

Bates vs. Equitable Ins. Co., 10 Wallace, 77 U. S. 33.

and minority opinion by Judge Killetts in the instant case (R. 236, last paragraph, and R. p. 244).

POINT C.

Even though the loss-clause rider had contained the added words "as interest may appear," which are pointedly absent from the loss clause involved in the instant case, such loss-clause rider would not have constituted a waiver of the prohibited incumbrance by chattel mortgage.

The exact language of the loss-payable-clause rider in the case at bar is as follows (R. 127):

> "Any loss under this policy that may be proved due shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy."

The provisions of the policy pertinent to this discussion are the following, as quoted in the dissenting opinion (R. 233):

> "1. This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such pro-

visions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached."

"2. This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

"3. If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee * * * the conditions hereinbefore contained shall apply to the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto."

It was squarely held in

Atlas Reduction Co. vs. New Zealand Ins. Co.,
(Majority opinion by Judge Van Devanter), 138 Fed. 497,

as to a loss-clause rider identical with that in the instant case, except that the rider there contained the additional words "as interest may appear," which are significantly absent here, that—

"(e) The endorsement does not give consent to the incumbering of the insured personal property by a chattel mortgage (1) because it does not mention a chattel mortgage, or describe D. & S. as chattel mortgagees, or show

that the attention of the parties was directed to a chattel mortgage; (2) because it was not necessary that there should be a chattel mortgage to enable the insured to make a valid appointment of D. & S. to receive payment of the loss, if any, or to give them an interest in the payment of the loss; and (3) because the words 'subject to all the conditions of this policy' show that the conditions were not intended to be abrogated or waived, but to have effect and be respected as if the indorsement had not been made, and among the conditions of the policy are these: 'This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage * * * and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy * * * unless such waiver, if any, shall be written upon or attached hereto."

and (Opinion, p. 508)—

"that the indorsement did not in terms or by implication consent to the incumbrance created by the chattel mortgage, and that in consequence the policy was avoided by that incumbrance."

To the same effect are:

Bank vs. Hartford Fire Ins. Co. (Dist. Court, S. D. Fla. 1924), 1 Fed. (2nd) 43.

Delaware Ins. Co. vs. Green (C. C. A. Kansas, 1903), 120 Fed. 916.

Erie Brewing Co. vs. Ohio Farmers Ins. Co., 81 O. S. 1, 19-20.

POINT D.

The absence from the loss-clause rider here in question of the phrase "as interest may appear," upon which was based the dissenting opinion in the Atlas Reduction Co. Case, 138 Fed. 497, and the other decisions cited by the majority of the Circuit Court of Appeals, leaves the decision of the majority of the Circuit Court of Appeals in the case at bar without precedent and in direct conflict with a controlling decision of this court.

This proposition cannot be more admirably stated than in the language of Judge Killetts in his able dissenting opinion in the case at bar (R. 234-235; 236-238):

> "In the Atlas Case (138 Fed. 497) the rider waiver, whose sufficiency was questioned, was: 'Subject to all of the conditions of this policy, loss, if any, payable to D. & S. as their interest may appear.' The majority holding was that this language did not 'in terms or by implication consent to the incumbrance created by the chattel mortgage.' Judge Hook, dissenting, held, that (page 514), among other things, notice might be taken that according to usage and custom the phrase 'as interest may appear' was used in such cases to refer to a chattel mortgage interest. This Court (Sixth Circuit) in Commercial Union Insurance Company v. Marshall, 118 Fed. (2) 457, 458, 459, where the rider was: 'any loss * * * proven to be due to the insured on this policy shall be held payable to D. as

interest may appear', indicated its preference for Judge Hook's reasoning and conclusion, but found that it 'expressly appeared', in the record before it, 'that according to the usages and practices of the community and of these insurance companies, this phrase "as interest may appear" was understood to cover and include a chattel mortgage interest, and was in the form of words in a printed rider regularly used by the insurance companies for covering and describing that kind of interest.' It was also held, independently of Judge Hook's view in the Atlas case, that 'the stipulation that the loss should be payable to Dacus "as interest may appear" • • • applied to his interest, whatever it was, and was notice to and recognition by the insurer of his interest in the property, then or thereafter.'

"In Firemen's Insurance Company *v.* Brooks, also by this Court, 32 Fed. (2nd) 451, the rider was, page 451, 'Any loss • • • shall be payable to Thomas Trimby, as interest may appear, subject, nevertheless, etc.' In that decision this Court squarely followed Judge Hook in the Atlas case, adding, page 452:

"If there were no other consideration, the familiar rule that an ambiguity should be solved against the insurance company, the party which selected the language used, would be applicable; for it is, at least, not clear that the language used might not have been intended to refer to that very interest which Trimby in fact had in the property, and which he and his grantor had agreed should be insured by the grantor and by this policy for Trimby's benefit." • • •

"The foregoing concerning Judge Hook's

position in the Atlas case, and the view of this Court (Sixth Circuit) in the Marshall and Brooks cases, shows conclusively that the controlling fact in each was the phrase 'as interest may appear' in the waiver rider. In each the discussion centers around it and the final conclusion depends entirely upon its interpretation and the effect thereof: These cases are not unique in this respect. Citation may be multiplied to show that its use is of the utmost importance to safeguard an interest which otherwise might work to avoid the contract, its presence, at least, rendering the alleged waiving rider or indorsement ambiguous, permitting the rule of construction to operate when ambiguity is present.

"It is clearly established, and no longer controvertible, that the insured may select and nominate, for co-participation in the proceeds of his contract, a person who has no interest of any kind in the corpus of the insured property, and that, when that is done the insurer is called upon only to consider whether in case of loss it will honor such appointment. This was clearly recognized by both sides of the division in the Atlas majority opinion, page 508, minority opinion, page 509, et seq. 138 Fed., and also by this Court in the Brooks decision in the paragraph last quoted. See also, the Bates case, infra. Judge Hook, in the Atlas minority opinion, with that in mind, also applied the rule of construction followed by Judge Denison in the Brooks opinion where ambiguity exists, finding such ambiguity in the waiver rider then before him, wherefore he saw an occasion to examine into the intent of the contracting parties,

while conceding (page 513) that it cannot be said that there is room to resort to an inquiry into intent 'where plain and unequivocal language is employed'.

"I have dwelt at this length upon the three decisions involved in the preceding discussion because the majority cites them in support of its position, whereas, in my view of their respective facts and the acute issue involved in each, together with the manner in which, in each, its solution was attained, they negative the conclusions of the majority.

"Aside from another matter, to be discussed later, there are three outstanding differences, plainly shown by comparison of the records, distinguishing the three cases in question.

"First, the wording of the alleged waiving rider we are considering. This is startlingly inadequate to be supported by any of the 'as interest may appear' decisions, for that important phrase is entirely absent. Its wording is: 'Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy.'

"Secondly, there is not the slighest attempt, in the instant case, to allege or prove, aside from its own terms, with what intent or to serve what purpose the rider was used.

"Thirdly, there was no attempt here to show, what apparently was on the record in Marshall's case, *supra*, that the rider is 'in the form of words in a printed rider regularly used by the insurance companies for covering and describ-

ing that kind of interest,' i. e., chattel mortgage interest.

"In short, the records this Court is considering are so meagre as to allegation, proof or attempt to prove, that, in my view, we are forced, majority and minority, to judge the effect of this attachment to the several policies, by considering the naked language used, and the quoted stipulations which the majority considers it to qualify—these three factors and, absolutely nothing else."

The decision of the majority of the Circuit Court of Appeals in the instant case is therefore wholly without the support of precedent, and in fact is in direct conflict with the law as settled by this court in

Bates vs. Equitable Insurance Co., 10 Wallace, 77 U. S. 33,

where, as in the case at bar, there was no attempt to allege or prove, aside from its own terms, with what intent or to serve what purpose the rider was used, and where, as in the case at bar, there was no attempt to show what was in the record in the *Marshall* case (18 Fed. (2nd) 457), relied upon by the majority, namely, that the rider here used is "in the form of words in a printed rider ordinarily used by the insurance companies for covering and describing that kind of interest" that is, chattel mortgage interest.

The policy in the *Bates* case provided that if the property were sold the insurance ceased unless the insurer consented in writing, and it was held by this Court that an endorsement on the policy that the

policy was "payable in case of loss to E. C. Bates," followed by the insurer's endorsement that "consent is hereby given to the above endorsement," did not imply either knowledge or consent to a sale of the insured property. In that case the property had been sold to Bates, the appointee. In that case, as here, there was, as noted by Justice Miller, page 37 of the report, no proof of a course of dealing between the parties or a usage and custom which qualified the language used, wherefore this Court saw in the language used "nothing more than the direction of Philbrick (the insured) and the consent of the company that any loss sustained by Philbrick, covered by that policy, should be paid to Bates."

As to the *Bates* case the majority of the opinion of the Circuit Court of Appeals in the instant case says:

> "In that case there was no evidence 'outside of the two indorsements * * * that there was any consent to accept Bates, the purchaser, as the party whose interest was insured,' and hence the question became determinable upon implications arising from the indorsements alone. It was pointed out in that case, however, that if it had been shown that it had been the course of dealing between the parties to recognize the indorsement of the party first assured as evidence of a sale or the indorsement of the company as a consent to the sale, or if it had been shown that by custom and usage in any particular place such indorsements were so treated, 'the case might be different.'"

As stated by Judge Killetts in the dissenting opinion in the instant case (R. 243):

"In the instant cases there are none of the qualifications, such as are referred to in the foregoing quotation, because of which 'the case might be different,' wherefore, here, as in the Bates case, 'the question becomes determinable upon implications arising from the indorsements (rider) alone."

POINT D-1.

If it be assumed, as asserted in the majority opinion of the Circuit Court of Appeals in the instant case (R. 227), that the absence from the loss-clause rider in the instant case of the words "as interest may appear" is immaterial, then the majority opinion in the instant case is, as it professes to be (R. 228), in square conflict with the unanswerable majority opinion of Judge Van Devanter in

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

POINT E.

Since the loss-payable-clause rider here does not contain the phrase "as interest may appear," the rider and policy are both entirely clear and free from ambiguity, and the majority opinion in this case has therefore violated the rule that it is not permissible for a court by construction to declare and "make a plain agreement ambiguous and then to interpret it in favor of the insured," but that, if insurance contracts, as here, "are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense."

The only clause in any form of loss-payable rider considered in any of the cases referred to in the majority and dissenting opinions of the Circuit Court of Appeals in the instant case which has been asserted by any Judge to be even potentially ambiguous is the clause "as interest may appear." Even the majority, in its opinion, in the instant case, does not venture to assert that the loss-clause rider here in question, from which the parties have deliberately eliminated the phrase "as interest may appear," is ambiguous or fairly susceptible, from its own language alone, of the construction that it is intended as a consent to the prohibited chattel-mortgage lien. On the contrary, the clear language is that "any loss under this policy *that may be proved due* shall be payable to the assured and the Cumberland Savings Bank Company, Cumberland, Ohio, *subject, nevertheless, to all the terms and conditions of the policy.*"

Because these insurance contracts are thus clear and unambiguous, they are "to be construed according to the sense and meaning used, and if they are clear and unambiguous, their terms to be taken and understood in their plain, ordinary and popular sense," as held by this Court in

Imperial Fire Insurance Co. vs. Coos County, 151 U. S. 452, 463.

U. S. Fidelity & Guaranty Co. vs. Guenther, 281 U. S. 34 (decided Feb. 24, 1930).

The rule that where the insurance contract is fairly susceptible of two different constructions, that one will

be adopted which is favorable to the insured, "ought not to be permitted to have the effect (as in the majority opinion in the case at bar) to make a plain agreement ambiguous and then to interpret it in favor of the insured."

Insurance Co. vs. McNulty, 157 Fed. (8 C. C. A.), 224, 226.

In the language of Judge Killits in his dissenting opinion in the instant case:

> "My conclusion, based on what seems to me to be the unambiguous character of its language to merely appoint the bank as a co-participant with Scott in recovery on the policies, and its utter lack of informing quality that the moral hazard of a mortgage lien attends the risk, is obstinate that the majority has failed to observe the rule laid down by Judge Hickenlooper, in the Guenther case, referred to at the opening of this opinion, equally applicable to the construction of an effort to work a waiver of the provision for defeasance in case of a lien increase in the risk, that 'resort cannot be had,' in a case such as here, to the rule respecting resolution of ambiguities, because there is here no 'double meaning' for that here the language used will not 'fairly and reasonably support that construction upon which liability of the insurer may be sustained.'"

POINT F.

The majority opinion in this case has erred in basing its construction as to the meaning and effect of the loss-clause rider, in conflict with the rider's clear wording, upon a supposed custom or usage assumed by the court, and for which there is no foundation in the pleadings or in the evidence or in point of fact.

It is only where the possibly ambiguous phrase "as interest may appear" or other ambiguous language is employed in the loss-payable clause or policy, that a pleading and proof of a custom or usage that the phrase "as interest may appear" was understood to include a chattel-mortgage interest would be relevant to aid in a construction of the contract. In the absence of ambiguity and of such pleading and proof of custom or usage, the construction of the policy-and-loss clause must be "determinable upon the implications arising from the endorsements alone."

Bates vs. Equitable Insurance Co., 77 U. S. (10 Wall.) 33.

Here the loss-clause rider contains no such phrase "as interest may appear."

Here there is no ambiguity of any kind.

Here there is no pleading or proof of custom or usage.

On the contrary, as said by Judge Killits in the instant case in his dissenting opinion:

> "In the instant cases there are none of the qualifications, such as are referred to in the

foregoing quotation, because of which 'the case might be different,' wherefore, here, as in the *Bates case*, 'the question becomes determinable upon implications arising from the indorsements (rider) alone.' "

Yet the majority Circuit Court of Appeals opinion, in the instant case, only achieves a holding that "the purpose in attaching them (the loss-payable-clause riders) was to grant authority to encumber the property by chattel mortgage"—

(1) By assuming an ambiguity which does not exist in the language, and

(2) By assuming a usage or custom that the loss-payable-clause rider, as here, phrased without the words "as interest may appear," was understood to permit chattel-mortgage encumbrance, though such assumed custom is neither pleaded, nor in proof, nor is in accordance with the actual facts.

POINT G.

The loss-payable rider was not a waiver of the prohibited encumbrance by chattel mortgage, because by its language it was not informative to the insurer of the existence of the inhibited lien, and knowledge of the insurer's agent may not be imputed to his principal under this form of policy, no actual knowledge by the insurer being otherwise shown.

The policy provision (hereinbefore quoted) in the instant case limiting the validity of waivers and modifications of the contract to such waivers as are en-

dorsed in writing upon the policy has frequently been construed by this Court.

Under that provision, an endorsement or rider claimed to work a waiver, as provided in that stipulation of the policy, must be so worded that the acceptance of it by the insurer should be regarded *as an agreement* to continue the contract in spite of the otherwise voiding presence of a mortgage lien; that is, that the situation shall involve at least an implied consent that an interest shall exist in favor of a mortgage.

The construction and effect of that provision was settled by this Court in

Insurance Co. vs. Grandview Building Assoc., 183 U. S. 361,

where it was held that the

> "limited grant of authority (to waive) is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as a matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance of such conditions; that, where waiver is relied upon the plaintiff must show that the company, *with knowledge of the facts that occasioned the forfeiture,* dispensed with the condition; that where the waiver relied on is the act of an agent, it must be shown, either that the agent had *express authority* from the company to make the waiver, or that the company, *with knowledge of the facts,* ratified the action of the agent."

It follows, from this decision, that in the absence of actual knowledge by the insurer, otherwise shown, the alleged waiving indorsement or rider must be informative of the existence of the inhibited lien, and that knowledge of the insured's agent, not communicated to his principal, may not be imputed to the insurer.

The doctrine of the Grandview Building Association case has been repeatedly reaffirmed by this Court.

Lumber Underwriters vs. Rife, 237 U. S. 605, 609.

Penman vs. St. Paul Fire & Marine Insurance Co., 216 U. S. 311 (1910), Syl. and pp. 321, 322.

Mutual Life Insurance Co. vs. Hilton Green, 241 U. S. 613, 624 (1916).

Ætna Life Insurance Co. vs. Moore, 231 U. S. 543, 559 (1913).

Prudential Insurance Co. vs. Moore, 231 U. S. 560, Syl. 3 (1913).

The loss clause neither describes the payee as mortgagee, nor by words or intimation in any manner mentions chattel mortgage. The clause here, therefore, clearly is not informative to the insurer to the existence of the inhibited chattel mortgage, but performs an entirely different office well known to insurance practice, of appointing a person having no interest in the insured property to participate in the policy's proceeds.

Under the non-waiver clause of the insurance contract, knowledge by the insurer's agent of the prohibited chattel mortgage is not imputed to the insurer.

There is no proof whatever that the insurance company itself knew of the mortgage, or had the slightest hint that the bank was interested in the insured property in any way. Nor is there any proof, or even pleading, that it was intended by this phraseology of the loss-clause rider to convey such information to the insurer or to have the rider work a waiver of the defeasance clause in the contract.

In the face of these undisputed facts, and the entire lack of ambiguity in the contract, and in the face of this rule settled by this Court of non-imputation of the agent's knowledge, the majority of the Court of Appeals, in its opinion, holds that "the endorsements (loss-payable riders) were intended to authorize the encumbrance of the property by chattel mortgage", and bases that holding on the further assertion that "in this case it clearly appears that the endorsements were made with full knowledge of the facts".

In the unanswerable language of Judge Killits in the dissenting opinion (R. 244):

> "Even if Bracken's acts in attaching the rider should be imputed to the insurers in spite of his adverse interest, in the performance of those acts, as the managing agent of the beneficiary of the riders, still in face of the immanent doctrines of the Northern Assurance case that his knowledge is not that of the insurers and that definite provisions of the contracts as to the character of the waiver as a carrier of information such as we have must be honored, it is of no importance as these records stand. The question is not decided by what Bracken knew or intended or both. It is the

matter of what knowledge the insurers had of the purpose of the riders that counts."

POINT H.

Knowledge of the insurer's agent, Bracken, of the inhibited lien when he attached the rider, and his act in employing this form of rider, may not be imputed to his insurance company principal, for the additional reason that Bracken was acting in a dual incompatible agency for his bank principal on the one hand, and for his insurance company principal on the other.

It cannot be said in this case that the production and attachment of the closs-clause riders employed in this case by Bracken was the act of his insurance company principal, because of the incompatible duality of representative obligations of Bracken, cashier of the payee bank. These obligations were then wholly incompatible. His activity in increasing the moral hazard through the chattel mortgage was for the advantage of his bank principal, and correspondingly to the disadvantage of his insurance company principal. This incompatible duality makes it impossible to attribute to the insurer any act of his which favored either the bank, or the insured through the bank.

Mulrooney vs. Insurance Co., 163 Fed. 133, 135 (9 C. C. A.).

American Surety Co. vs. Pauly, 170 U. S. 133.

POINT I.

The great importance to the business world, the insuring public, and the insurance companies of an authoritative judicial determination of the legal effect of the loss-clause rider here employed calls for a review and final determination of this case by this Court, and particularly so in view of the direct conflict of opinion between various Courts of Appeals and the Judges of the Court of Appeals in the instant case.

It is of vital importance to the insuring public to be able, as security for indebtedness due from the insured, to designate a creditor who has no interest in the insured property as payee in case of fire loss, without thereby assuming the greatly increased premium expense properly chargeable to the materially increased hazard incident to a permitted encumbrance by chattel mortgage.

It is likewise of vital importance to the insurance companies to know whether, by use of the particular form of loss-clause rider here employed, the purpose thereof has been accomplished by permitting this highly desirable commercial transaction without thereby imposing upon the insurance company the material increase of hazard of chattel mortgage encumbrance. As this Court held in

Imperial Fire Ins. Co. vs. Coos County, 151 U. S. 452:

> "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. For a comparatively

small consideration the insurer undertakes to guaranty the insured against loss or damage upon the terms and conditions agreed upon, and upon no other; and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. * * * If the insured has violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the insured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

POINT J.

The insurer, by disagreeing with the insured under non-waiver agreement as to the amount of the loss, without denial of liability, and by filing an answer after suit averring the defense of failure by the insured to perform the condition precedent as to appraisal, and the further consistent defense of violation of the policy inhibition against encumbrance by chattel mortgage, did not waive its right to require performance by the insured of the condition requiring an award of appraisers fixing the amount of loss as a condition precedent to the insured's right of action on the policy.

The validity or interpetation of an insurance con-

tract—as distinguished from the question as to what constitutes waiver or modification thereof—is governed by state law.

Hartford Fire Ins. Co. vs. Nance, 12 Fed. (2d) 575, 576.

Carpenter vs. The Providence Washington Ins. Co., 41 U. S. (16 Peters) 495, 511, 512.

Ætna Insurance Co. vs. Moore, 231 U. S. 543.

Liverpool and Great Western Steam Co. vs. Phœnix Insurance Co., 129 U. S. 397, 443.

It is the settled Ohio rule of construction of the standard fire insurance policy here involved, binding on the Federal courts, that the condition of the insurance contract requiring the amount of loss to be fixed by a board of appraisers in the event of disagreement between the insured and the insurer as to the amount of loss, is a condition precedent, the performance of which is mandatory upon the insured before a cause of action against the insurer on the policy matures.

In *Graham vs. Insurance Co.,* 75 O. S. 374, it is held in the first syllabus (which is controlling in Ohio):

> "* * * such provisions constitute a condition precedent, which imposes an obligation on the insured, in the event of disagreement as to the amount of loss, to procure an award or ascertainment of the loss by appraisers, or to show a legal excuse therefor, before he can maintain a suit on the policy to recover the loss, except as such condition is modified as to a total loss (to real estate) by Section 3643, Revised Statutes; and in a suit to recover such a loss, in the absence of an award of appraisers,

and of a demand for such appraisal by either the insured or the insurer, no cause of action is shown."

To the same effect is

Insurance Co. vs. Carnahan, 63 O. S. 258, Syllabus 5.

The majority of the Circuit Court of Appeals in its opinion disposes of the defense of plaintiff's failure to obtain an award of appraisers in the following language:

> "There was no arbitration, and no steps were taken by the plaintiff to bring one about. Hence it is contended by the insurance companies that the present suits cannot be maintained. We do not agree with the contention. The contracts of insurance did not provide for arbitration of the question of liability but of the amount of loss in case of disagreement. The defendants denied liability before suit was brought and after it was brought. Their defense went to the question of liability, not to the amount of loss. The arbitrational question, therefore, was never reached, and the defendants did not permit it to be reached. In this situation they cannot say that suits on the policies cannot be maintained."

The sole ground of the majority's holding that the plaintiff's failure to obtain an award of appraisers was not a bar to his recovery is thus the assumption of the majority that—

> "The defendants denied liability before suit was brought and after it was brought."

This is an assumption in direct conflict with the facts in the record.

An examination of the record will disclose that the question of liability or non-liability by the insurance company was never discussed, before suit was brought, between the plaintiff and defendant either orally or by writing. The only witness who testified as to any oral conversation with the adjuster of the company after the loss was the plaintiff himself, who testified that the conversation was under non-waiver agreement (Ex. 7, R. 141), and nowhere in his testimony does he claim or even intimate (R. 75, 78) that the adjuster of the insurance companies ever at any time denied liability. The only communication in writing from the insurance company to the plaintiff, appellee, prior to suit, was the letter of November 24, 1926, in which the insurance company set forth the respects in which the proofs of loss furnished by the insured did not conform to the requirements of the policy, and in which the company expressly disagreed with the plaintiff as to the amount of the loss. This letter appears as "Exhibits 19, 22 and 23" (R., pp. 198, 202, 203). On its face this letter shows that it does not contain or purport to contain any denial of liability.

As held in *Orenstein vs. Star Ins. Co. of America*, 10 Fed. (2d) 754:

> "Syl. 2. Insurer did not waive defense of increase of hazard by not denying liability on this account, when rejecting proofs of loss on the ground that they did not correctly state the loss; there being then no denial of liability on

any ground, and the rejecting being but an 'action taken' relative to the amount of loss, within the prior non-waiver agreement of the parties, expressly preserving insurer's rights and defenses from loss by waiver."

Page 757:

"'Defendants did not deny liability on the policy when rejecting the proofs of loss upon a different ground from that set up in the answer. *They did not deny liability at all. They simply rejected the proofs submitted, on the ground that they did not correctly state the loss.* This could not amount to a waiver because the rejection of the proofs of loss was an 'action taken' under the terms of the non-waiver agreement quoted above, which expressly preserved defendants' rights and defenses. * * *

"The execution of the non-waiver agreement was in itself notice that the defendants might assert defenses against the policies. The fact that the defendants did intend to assert such defenses could not possibly preclude them from insisting that any action taken under the non-waiver agreement be taken in accordance with the terms and provisions of the policies or from insisting on a forfeiture in case of a breach of its conditions."

This rule likewise prevails in the courts of Ohio, as held in *Edward Everett Co. vs. German American Ins. Co.*, 9 Ohio *Nisi Prius* (N. S.), 241 (affirmed 81 O. S., 573):

Syl. "A reply by an insurance company to a proof of loss, that it has reason to believe the

> cash value of the loss was much less and the salvage much more than claimed by the insured, *is not a denial of liability* by the company or a waiver of the provision of the policy for an appraisal, but amounts to a disagreement with the insured as to the amount of loss sustained and calls for an appraisal, and in a subsequent action on the policy it is not competent for the insured to give his reasons for not demanding an appraisal."

The Circuit Court of Appeals is therefore clearly in error in stating as the ground of its majority decision that "the defendants denied liability before suit was brought."

After suit was brought, the record shows that the only step taken by the defendant was to file its answer, in which the defendant, as permitted by the statutes of Ohio, set forth as many consistent defenses as it had, including the defense of plaintiff's failure to secure an award of appraisers, required as a condition precedent in the contract, and including also plaintiff's violation of the condition prohibiting incumbrance by chattel mortgage.

The Ohio statute in this connection, Ohio General Code 11315, is as follows:

> "The defendant may set forth in his answer as many grounds of defense, counter-claim and set-off as he may have, whether such as heretofore have been denominated legal or equitable, or both. But the several defenses must be consistent with each other, and each must refer in an intelligible manner to the cause of action which it is intended to answer."

A denial of liability made after suit is brought, whether in a pleading or otherwise, could not induce the insured to believe that his performance of such condition precedent would be futile, because the commencement of the action fixes the rights of the parties as to performance or non-performance of such conditions precedent to the maturing of a cause of action.

The holding of the Circuit Court of Appeals majority on this point nullifies the statutory permission given a defendant under the statutes of Ohio to set up as many consistent defenses in his answer as he may have, and is in direct conflict with the law of Ohio as settled by the following decisions:

Insurance Company vs. Carnahan, 63 O. S. 258:

> Syl. 7. "Under Revised Statutes, Section 5071 (Gen. Code 11315), a defendant may set forth in his answer as many grounds of defense, counter-claim or set-off as he may have, provided that they are so far consistent that they can be verified by oath without swearing falsely; and within the limits of that section, an insurer may join in his answer a defense that the insured has not performed a condition precedent as to arbitration or appraisal of the amount of the loss, with other defenses which, if successfully maintained, would discharge the insurer from liability altogether."

To the same effect is

Fire Association vs. Agresta, 115 O. S. 426, 430.

The majority of the Circuit Court of Appeals therefore has committed clear and prejudicial error in dis-

posing of the appraisal defense on the erroneous assumption that "the defendants denied liability before suit was brought and *after it was* brought".

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that conflicts between decisions of various circuit courts of appeals, and between the decision of the majority of the Circuit Court of Appeals in the instant case and the decisions of this Court be avoided, and to that end that a writ of certiorari should be granted, and that this Court should review the decision of the Circuit Court of Appeals for the Sixth Circuit in this case and finally reverse said decision.

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